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84-1411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No._____

ARKANSAS-BEST FREIGHT SYSTEM, INC.,
Petitioner,

v.

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXINE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H. F. MITTCHELL, AND L. R. YOUNG.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is an employer required to pay an employee wages under the Fair Labor Standards Act (FLSA) for time spent performing a safety inspection mandated by a Department of Transportation regulation where the regulation specifies the burden of performing the inspection rests upon the employee and further specifies when the inspection will be performed and the items to be inspected?

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Petitioner, Arkansas-Best Freight System, Inc., is a wholly owned subsidiary of Arkansas Best Corporation, ABZ, N.Y. Stock Exchange.

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LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXINE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H. E. MITTCHELL, AND L. R. YOUNG,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Arkansas-Best Freight System, Inc. respectfully petitions this Court to issue a writ of certiorari to review the opinion and judgment of the United States District Court of Appeals for the Eighth Circuit, entered in this proceeding on December 10, 1984.

OPINIONS BELOW

The first opinion of the district court, which is not officially reported, is set forth at pages 19-31 infra. The first opinion of the court of appeals is reported at 615 F.2d 1194. The opinion of the U.S. Supreme Court is reported at 450 U.S. 728, 101 S.Ct. 1437 (1981) 67 L.Ed. 2d 641 The second opinion of the district court, which is not officially reported, is set forth at pages 33-35 infra. The second opinion of the court of appeals is reported at 750 F.2d 47 (1984) and is set forth at pages 36-43 infra.

JURISDICTION

The judgment of the Court of Appeals, which is appealed from, was entered on December 10, 1984. This Court has jurisdiction to review the Court of Appeals' judgment pursuant to 28 U.S.C. §1254(1).

STATUTE AND REGULATORY PROVISIONS INVOLVED

29 U.S.C.A. §206(a):

"Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than 3.10 an nour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;"

29 U.S.C.A. §254:

"RELIEF FROM CERTAIN FUTURE CLAIMS UNDER FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, WALSH-HEALEY ACT, AND BACON-DAVIS ACT

(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 —

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) . . .

(c) . . .

(d) . . ."

49 CFR, Section 392.7:

"No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:

Service brakes, including trailer brake connections.
Parking (hand) brake.
Steering mechanism.
Lighting devices and reflectors.
Tires.
Horn.
Windshield wiper or wipers.
Rear-vis on mirror or mirrors.
Coupling devices."

49 CFR, Section 392.8:

"No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the emergency equipment required by Sec. 393.95 and 393.96 of this subchapter is in place and ready for use; nor shall any driver fail to use or make use of such equipment when and as needed."

STATEMENT OF THE CASE

A. Facts

(i) Arkansas-Best Freight System, Inc. (ABF) is an interstate common carrier by motor vehicle. All of the respondents are driver/employees of ABF. All interstate common carriers by motor vehicle and its drivers are subject to Federal Motor Carrier Safety Regulations, 49 C.F.R. §390, *et seq,* promulgated by the U. S. Department of Transportation (DOT) under the authority of the Interstate Commerce Act, 49 U.S.C. §304. The regulations require, *inter alia,* that before embarking on an over-the-road trip, a driver must perform a safety inspection of his vehicle. In performing the safety inspection, the driver must inspect eleven items specified in the regulation. 49 C.F.R. §392.7, §396.4 (1979).

ABF does not compensate its drivers based at its Little Rock, Arkansas terminal for the time spent con-

ducting the safety inspection and, when necessary, taking the vehicle to the company's repair facility.

(ii) The Proceedings Below

Two of the drivers, respondents, Lloyd Barrentine and Jimmy Scates[1] filed several grievances, the first in 1969 alleging that ABF's failure to pay for the time involved in the pre-trip inspections violated the collective bargaining agreement. Those grievances were presented by the respondents' Union through a Joint Grievance Committee which denied the grievance on the grounds that it was not "time spent in the service of the Employer" as required by the collective bargaining agreement. In March, 1977, two grievants, joined by four other ABF drivers, brought an action in the United States District Court for the Eastern District of Arkansas to obtain pay for the time spent conducting the pre-trip safety inspections. In the first count of their complaint, drivers alleged that the time at issue was compensable under the Fair Labor Standards Act, 29 U.S.C. §201, *et seq* (FLSA). In the second count, plaintiffs asserted that their local Union had breached its duty of fair representation and therefore the grievance awards barring the compensation should be set aside.

Following a bench trial, the district court issued an oral ruling refusing to award plaintiffs' judgment on the contract claim finding that there was no breach of the duty of fair representation. Based on these findings, the district court dismissed the action with preju-

[1]A comprehensive analysis of prior proceedings and Court rulings may be found in the following appellate decisions: **Barrentine v. Arkansas-Best Freight Systems, Inc.,** 450 U.S. 728 (1981); **Barrentine v. Arkansas-Best Freight Systems, Inc.,** 615 F. 2d 1194 (8th Cir. 1980).

dice. The Court did not address or rule on plaintiffs' FLSA claim.

On appeal, the Eighth Circuit unanimously affirmed the district court's ruling on the contract claim. A divided Eighth Circuit held that the FLSA claim was also barred because the collective bargaining agreement provided for binding arbitration of wage disputes.

This Court granted a petition for writ of certiorari by the drivers to review the question of whether or not an employee's prior submission of his contractual claim for wages to a Grievance Committe as required by collective bargaining agreement foreclosed the federal court from reviewing the subsequent claim under the minimum wage provisions under the FLSA where the FLSA claim was not submitted to or passed on by the Grievance Committee. On April 6, 1981, this Court rendered its opinion in *Barrentine, et al v. Arkansas-Best Freight System, Inc., et al, supra,* holding the wage claims under the FLSA were not barred by prior submission of the grievance to the contractual dispute resolution procedures. The decision of the Eighth Circuit was reversed and the case remanded to the trial court for further proceedings.

Without further hearings or accepting additional evidence, the trial court, based on the state of the record, entered its Order June 16, 1983 holding the driver entitled to minimum wage compensation for the time spent conducting the pre-trip safety inspections in cases where defects were found and enjoining ABF from continuing to violate the FLSA by refusing to pay minimum wages for the time.

ABF appealed the decision of the trial court to the Eighth Circuit Court of Appeals on the grounds that:

(1) the time spent performing the DOT inspection is not compensable under the FLSA and (2) the drivers were not entitled to injunctive relief. On December 10, 1984, the Eighth Circuit rendered its opinion holding: (1) time spent performing the safety inspection was compensable under the FLSA and (2) reversing and vacating the injunction entered by the trial court.[2]

[2]Judge Richard Arnold, the initial trial judge, became a member of the Eighth Circuit Court of Appeals subsequent to the trial and the second trial judge was the Honorable George Howard, Jr.

REASONS FOR GRANTING THE WRIT

The decision below is inconsistent with the decisions of this Court and is in direct conflict with the decision of another circuit.

(A) In *Tennessee Coal, Iron & R. Co. v. Muscoda Local* 123, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949, rehearing denied 322 U.S. 771, 64 S.Ct. 1257, 88 L.Ed. 1596 (1944), the U.S. Supreme Court established a three-prong test for determining whether or not hours worked were covered by the FLSA:

(1) The activity must require physical or mental exertion;

(2) The exertion be controlled or required by the employer; and

(3) The exertion must be pursued necessarily and primarily for the benefit of the employer and his business. See *Tennessee Coal, Iron & R. Co. v. Muscoda* Local 123, *supra,* at 703.

The requirements for and the elements of a safety inspection in the instant case are dictated by the requirements of the Federal Motor Carrier Safety Regulations, 49 CFR 390, et seq, which were promulgated by the United States Department of Transportation under the authority of the Interstate Commerce Act, 49 U.S.C. §304. The requirement that the inspection be made by the driver and not the company is set forth in 49 CFR §392.7:

> "No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed" . . .

The Pre-trial Stipulation, Article II, Undisputed Facts (F), page 4 provided by stipulation:

> "Plaintiffs and other over-the-road drivers of A.B.F. are required by 49 C.F.R. §§392.7, 392.88, 393.95 and 393.96 to make a pre-trip inspection of his tractor-trailer unit to determine whether certain parts and accessories are in good working order and that certain emergency equipment is in place and ready for use."

The Department of Transportation inspection was not established by the employer; it is not imposed by the employer; it is not the employer's responsibility; and it is not performed under the direction, supervision or control of the employer. Rather the inspection is performed at the discretion of the employees as to time and manner. The employer does not know whether or not the inspection is performed by the employee and exercises no control over same. The items to be inspected have been established by the Department of Transportation and not the employer. Nothing has been added to the inspection list established by the Department of Transportation. The inspection is not under the "control" of the employer as required by the 'Muscoda" test.

Mr. William Karston, the Director of Labor Relations for the company, testified that he had observed the drivers' activity at Little Rock after they punched out of the dispatch office. (T. 370) He described those activities as going out into the yard and visiting socially and installing personal equipment such as citizen's band radios and seat cushions onto their company owned vehicles. He testified that these items were personal items of the drivers and not company equipment. (T. 371) Mr. Karston further testified that

ABF does not make any effort to try to regulate the time between when the driver punches out from the dispatcher's office and the time he departs. He further stated that the time was for the personal convenience of the driver and was not policed by the Company. (T. 371)

As has been previously pointed out by the Eighth Circuit in *Barrentine, et al v. Arkansas-Best Freight System, Inc.,* 615 F.2d 1194 (8th Cir. 1980) at page 1201, the inspection was not for the primary benefit of the employer as required by *Tennessee Coal, Iron & R. Co. v. Muscoda Local* 123, *supra,* but rather:

> "After all, the policy is designed for the welfare of the drivers as well as for the benefit of employers and third party members of the traveling public."

In *Leone v. Mobile Oil Corporation,* 523 F.2d 1153 D.C. Cir. 1975), the D.C. Court of Appeals had occasion to interpret and apply the *Tennessee Coal* doctrine in a case involving the application of the FLSA to the time spent by employees participating in an OSHA safety inspection. In analyzing the three-prong test that Court said at page 1163:

> "In applying the *Tennessee Coal* test that the activity be controlled by the employer and primarily for his benefit, we find that employees accompanying an OSHA inspector, fail to satisfy either requirement. It is true, as plaintiffs state, that furthering industrial safety benefits the employer. This benefit, however, does not require a finding that the activity is *primarily* for the employer's benefit. Many activities which may increase employee effectiveness and thus benefit the employer are not worktime activities under the FLSA."

Thus, the employee's claims must fail because they

do not meet two of the tests set forth in *Tennessee Coal, supra.*

(B) The time spent is exempt under the Portal-To-Portal Pay Act.

29 U.S.C. §254, the Portal-To-Portal Pay Act, provides that no employer shall be subject to any liability under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act or the Bacon Davis Act to pay an employee the minimum wage or to pay an employee overtime compensation for any activities which are "preliminary" or "postliminary" to the principal activities of the employee if same occurs on or after May 14, 1947. The principal activity of the respondents consists of driving trucks loaded with freight in interstate commerce. The respondents have so testified that such was their principal activity and the inspection was incidental thereto. The respondent Mr. Deaton testified at T. 217 that his primary job was to drive a truck for ABF. The respondent Mr. Blanton testified at T. 279 that his primary duty was to drive over-the-road. The respondent Mr. Mitchell testified at T. 197 that his primary function for the company was to drive. The Pre-Trial Stipulation, Article II, paragraph A, states:

> "The primary job duty of each plaintiff consists of driving trucks loaded with freight in interstate commerce."

Although this Court is not bound by the decision of the Joint Grievance Committee as to whether or not the time is compensable, the Supreme Court did state in *Barrentine, et al v. Arkansas-Best Freight System, Inc., et al, supra,* at page 1446, footnote 22:

> "We do not hold that an arbitral decision has no evidentiary bearing on a subsequent FLSA action

in court. As we decided in *Gardner-Denver,* such a decision may be admitted into evidence, but

> "(w)e adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with (the statute), the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's (statutory) rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. . ."

In the instant agreement article 50 of the collective bargaining agreement provided, *inter alia*:

> "All employees covered by this agrement shall be paid for all time spent in the service of the employer."

The requirement of article 50 of the collective bargaining agreement for payment is even more broad than the requirement of the FLSA. The threshhold decision made by the grievance committee was whether or not time spent in performing the DOT safety check was spent in the service of the employer. That decision required specialized knowledge, expertise and familiarity with the law of the shop possessed so uniquely by arbitrators. That decision should be accorded great weight by this Court in determining whether or not the time spent performing the DOT safety check falls within the coverage of the FLSA.

This Court should also take into consideration the fact that the record reflects that other grievance commite upon being presented with claims by Teamster employees under the same collective bargaining agreement reached the same conclusion as did this committee, i.e., the time spent in making the DOT safety check is not time spent in the service of the employer and is not compensable (See Defendant Union's Exhibits 2 and 3). If that time is not spent in the service of the employer. it certainly cannot meet the requirements of *Tennessee Coal, Iron & R. Co. v. Muscoda Local* 123, *supra,* or the FLSA itself.

In the case of *Chamber of Commerce of the United States v. OSHA,* 636 F.2d 464 (1980), the District Court of Columbia Court of Appeals again reviewed the question of whether walk around time spent by employees accompanying OSHA representatives conducting safety inspections at the work place constituted hours worked under the FLSA. In affirming its prior decision in the *Leone v. Mobile Oil Corporation, supra,* case, the court said at page 467:

> "Walkaround time does not constitute hours worked because it is not an activity controlled by the employer and engaged in primarily for the employer's benefit. See *Anderson v. Mt. Clemens Pottery Co., U.S.* 680. 691-693, 66 S.Ct. 1187, 1194-1195, 90 L.Ed. 1515 (1946); *Tennessee Coal, Iron & R. Co. v. Muscoda Local* 123, 321 U.S. 590, 598, 64 S.Ct. 698, 703, 88 L.Ed. 949 (1944). The employer neither selects the employee representative who accompanies the Administration inspector nor regulates the employee representative's conduct . . . Moreover as we also pointed out in *Leone,* although an employee may ultimately gain from improved industrial safety, the *primary beneficiaries* of the walkaround are the workers themselves."

The facts of the instant case fall neatly into the mold shaped by the District of Columbia Court in *Chamber of Commerce of the United States v. OSHA, supra*: Here, as in that case, the employer does not select the employee representative who performs the required activity. It is the Department of Transportation who has selected that employee by designating the driver. It could well be that the employer would prefer to have the safety check made by a qualified mechanic as opposed to a driver; however, that choice is not within the discretion of the employer. The employer in the instant case does not regulate the employee's conduct. The DOT regulations establish what the employee is required to do. The employer has neither added to or taken away from those regulations or requirements. The employer has protected itself against the results of accidents caused by safety defects through insurance and at most faces property damage loss which is compensable through such insurance. The employee on the other hand benefits from the safety inspection to a greater extent that the employer does because it is the employee himself who would be injured or killed in the event of an accident caused by a safety defect. In addition, the general public also benefits to a greater degree than the employer does because of the safety inspection.

Ciemnoczolowski v. O. O. Ordnance Corporation, 228 F.2d 929 (8th Cir. 1955), involves a case in which the employer required employees to change clothes and shower as a safety precaution against explosions. In holding that the time spent in changing the clothes and showering was not compensable under the FLSA and was excluded zecause it constituted preliminary or postliminary activities to the

principal employment, the Eighth Circuit said at page 933:

> "We must conclude that the necessity of an activity to the performance of a principal activity will not alone make the former a part of the principal activity.
>
> "Whether a preliminary or postliminary activity is necessary to the performance of the "principal activity", is an integral part of the principal activity is a question of fact to be determined from all of the relevant evidence."

29 U.S.C. §254 provides that employees are not entitled to pay for:

> "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> "(2) activities which are preliminary to or postliminary to said principal activity or activities."

The principal activities of the drivers in driving their freightloaded vehicles could be performed as efficiently and effectively without the performance of the DOT mandated safety inspection.

(C) The respondents have in fact been paid more than required by the FLSA. The respondents are paid on the basis of either mileage or an eight hours' minimum guarantee. As the lead respondent, Mr. Barrentine explained in his cross-examination beginning at T. 62 in response to a question by the Court, that he was paid in two different ways, one by the hour and the other by mileage. Mr. Barrentine explained that if the over-the-road trip that he pulled computed on a mileage resulted in pay for that particular day of less

than whatever the negotiated hourly wage rate was at the time for eight hours' pay the drivers received pay for eight hours at the negotiated wage rate rather than the mileage rate. In any event, the drivers received the higher of the two pay rates. Mr. Barrentine testified at T. 110 that during 1978 he was never compensated on a weekly basis for less than the minimum wage that was in effect that week. He further testified at T. 111 that would be true for all of the years in dispute. Mr. Barrentine further testified that his claim for back pay for the period from 1972 through 1978 for making the safety inspection was $63.40 during which time ABF paid him in wages $173,500 (T. 111). The respondent Mr. Mitchell's Answers to Interrogatories reveal that in 1972 he was paid $18,000.00 by ABF in wages; in 1973 $19,000.00;in 1974 $20,000.00; in 1975 $23,000.00; in 1976 $25,000.00; in 1977 $28,000.00; in 1978 $31,000.00. The respondent Mr. Mitchell reaffirmed the accuracy of the pay at T. 20 in his testimony. The respondent Mr. Blanton's Answers to Interrogatories stated that he received the following income from ABF for the years set forth opposite each income item: 1972 —$17,000.00; 1973—$18,000.00; 1974—$19,000.00; 1975 — $21,000.00; 1976 — $23,000.00; 1977 — $24,000.00; 1978 — $28,000.00.

The respondent Mr. Blanton also testified that he worked 50 to 60 hours per wek during each of the years involved. The respondent Mr. Mitchell testified that he worked 55 to 60 hours per week for each of the years involved.

The respondent Mr. Barrentine's Answers to Interrogatories indicated that he received the following income from ABF during the years involved: 1972—$20,700.00; 1973 — $17,600.00; 1974 — $24,000.00; 1975 —

$28,000.00; 1976 — $24,000.00; 1977 — $28,900.00; 1978 — $30,300.00. The Answers to Interrogatories for the respondent Mr. Barrentine also indicated that he worked 55 to 60 hours per week during the period involved.

The Answers to Interrogatories for the respondent Mr. Kenney indicate income from ABF for the years involved as follows: 1972 — $18,000.00; 1973 — $19,000.00; 1974 — $20,000.00; 1975 — $20,000.00; 1976 — $23,000.00; 1977 — $24,000.00; 1978 — $25,000.00. Mr. Keeney's Answer to Interrogatories also indicated that he worked 50 to 60 hours per week. It is thus clear that each of the respondents has been paid far in excess of the minimum wage as required by the FLSA.

The respondent Mr. Mitchell testified at T. 199 that there was no day on which he worked for ABF where he was paid an amount equal to or less than the federal minimum wage. He testified that it had always been substantially more. Mr. Mitchell testified at T. 199 that even taking the 15 minutes for making the safety inspection he claimed into consideration he still would have been paid more than the federal minimum wage in effect.

At this point in the examination of the witnesses, the trial court interrupted and the following exchange occured at T. 200:

> "THE COURT: Mr. Maurras, let me interrupt you just a minute and ask Counsel a question. Mr. Cottrell and Mr. McHughes, isn't it agreed that all of these Plaintiffs got paid more than the minimum wage?
>
> MR. McHUGHES: Yes.
>
> MR. MOTTRELL: Yes, Your Honor.

THE COURT: All right, sir. You don't need to go into that anymore, Mr. Maurras."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

—oOo—

LLOYD BARRENTINE, et al. PLAINTIFFS

vs. LR-C-77-85

ARKANSAS BEST FREIGHT SYSTEMS INC., et al DEFENDANTS.

REPORTER'S PARTIAL TRANSCRIPT
OPINION OF THE COURT

Little Rock, Arkansas
Friday, May 4, 1979

BEFORE HONORABLE RICHARD S. ARNOLD
United States District Judge

APPEARANCES

For the Plaintiffs: MR. JOSH E. McHUGHES and
MR. J. H. COTTRELL
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LITTLE ROCK, ARKANSAS, FRIDAY, MAY 4, 1979, 1:00 O'CLOCK P.M.

COURT CRIER: All please rise. The United States District Court for the Eastern District of Arkansas is once again in session. Please be seated and come to order.

THE COURT: Since all of the parties have rested the case is now ready for a decision, and the Court will now deliver its Opinion.

To begin with, the Court has jurisdiction of the case under Section 301 of the Labor Management Relations Act of 1947, and under Section 1331 of the Judicial Code, the General Federal Questions Division.

The claim presented arises under two federal statutes, Section 301 which I have already mentioned, the Minimum Wage Act or the Fair Labor Standards Act, 29 USC Section 216(b).

The parties remaining in the case on the plaintiffs' side are six in number and they are named in the caption of the Complaint; three of the plaintiffs have been dismissed with prejudice on motion of the defendants and with the consent of counsel for the plaintiffs at the beginning of the trial. The defendants are Arkansas Best Freight System, Inc., a trucking company, International Brotherhood of Teamsters, Local 878, a labor organization.

The question in the case has to do with whether or not the six named employees are entitled to be paid for a certain period of time that the parties have customarily referred as the pre-trip inspection time, or the DOT inspection time. This period of time occurs between what has been called punch-out and what has been called punch-in; that is, when the driver appears at a terminal to begin a trip, having been called in, his first duty is to pick up what they have referred to as

the bills, that is, a manifest showing where the trip is going and other necessary facts. At that point the driver punches a clock. That is referred to as punching out; then he goes to see if his vehicle, that is, the tractor and trailer that he is going to drive is in good enough shape to make the trip.

At this point under Section 392.7 of the Department of Transportation Regulations the driver is obligated to check the unit and the regulations list certain specific items that are to be checked. If the unit checks out, the driver gets in it and drives away and proceeds on his trip, for which under this contract he is paid at a mileage rate, providing, however, that he shall not be paid less than eight hours time.

If the unit does not check out, he takes it to be repaired at a repair shop belonging to the company and on the premises of the company, and when he arrives at the repair shop he punches in, that is, there is a second clock. And, of course, I am referring here to the Little Rock terminal only of Arkansas Best Freight, because that's the location about which this dispute has risen.

The truck is then repaired, and the actual time consumed in repairs, that is, between the time of punching in at the repair shop and the time that the truck is released to the driver, having been repaired, that time is paid for and there is no dispute about that.

There is also no dispute that the time consumed by a pre-trip inspection is not paid for if the vehicle checks out, because in that instance the driver simply drives away; he does not punch in or log time in any way. So, the question has to do with the period between punch-

ing out and punching in in those instances where the driver has found something wrong with the unit.

There has been a good deal of dispute in the case as to whether or not it is ABF's practice in other terminals to pay for this time. The Court is persuaded that it probably is the practice at other terminals to pay for the time.

It is true that the exhibits that have been introduced with respect to that issue are somewhat ambiguous, but the Court believes that other terminals do pay for this time, or at any rate that is going to be assumed as part of the basis for this decision.

The Court also is going to assume that other truck lines, specifically Strickland, pays for this time. The practice at Strickland is somewhat different; it appears to be a more or less arbitrary rule there, but fifteen minutes of this time is paid for regardless of how much time is actually consumed.

But, again, for the sake of the argument, the Court assumes that Strickland pays for the time and that is the regular practice.

So, what we have, initially at least, is a question of whether or not under Article 50 of the Collective Bargaining Agreement this time is time spent in the service of the employer. If this were an ordinary contract action involving not a Collective Bargaining Agreement but some other kind of contract, the Court would be strongly inclined to rule in favor of the employees. It is difficult for me to see, based only upon the wording of the contract, why this time is not in the service of the employer. It is true that the DOT Regulations places upon a driver personally the obligation of seeing that the unit is properly operating. There is no ques-

tion that the driver when doing so is on the employer's business; at least, no question in my mind.

And, in addition, it can be argued that it is the employer's duty if that unit is on the ready line to see that it is already in shape.

But this is not an ordinary contract action between private parties. This is an action on a Collective Bargaining Agreement. and the rules are quite different in construing and defining those agreemnts from the rules applicable in an ordinary contract case.

So, it is appropriate at this point to summarize briefly what the rules are with respect to Collective Bargaining Agreements.

To begin with, Congress has clearly specified in Section 203(b) of the Act of 1947, and I am quoting, "That final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes", 29 USC Section 173 (d).

There is such a method specified in this contract. Article 44 of the contract sets up a procedure for the handling of disputes as to contract interpretation called a "Grievance Procedure". Under this procedure an employee who believes that he has been mistreated can file a grievance with his Local Union, and it then becomes the duty of the Union to process that grievance with a Joint Committee; by "Joint" I mean the employers and the Union; called the Southern Multistate Grievance Committee. The Committee has sat at various locations, Buloxi, Dallas and Memphis have been mentioned. That Committee is composed of six members, three representing the management side and three representing the Union's side. None of the members

in a case involving ABF and Local 878 would be either employees of ABF or members of Local 878.

If that Grievance Committee decides the case by a majority vote, that is, at least four members concurring, under Article 44 of the contract the decision is final and binding on the parties. If on the other hand the Grievance Committe splits three to three, then there is a further procedure specified in the contract for resolution of the deadlock. There is no contention that the deadlock provisions ever came into play in this case because there was no deadlock.

In any case, the evidence is clear that there were grievances presented from time to time with respect to this issue. Two of the named plaintiffs, Mr. Barrentine and Mr. Scates actually presented grievances and those grievances were denied, that is, the committee decided that the grievances were not well taken. The committee decided that under the contract the money was not owed.

The other four employees did not actually present grievances. The defendants have argued that their claims should be dismissed because of failure to exhaust their remedies under the contract. This Court does not agree with that attitude. The Court finds that the grievances were not presented because it would have been a futility to present them. It was well known what the committee was ruling and there was no reason for the other employees to waste their time and paper by filling out grievances when the result was clear in advance.

So, the Court is treating the case as though each of the named plaintiffs had actually filed grievances which were considered and denied.

There is no evidence that a grievance was actually rejected, that is, there is no evidence that a grievance was ever taken to the Union and the Union official refused to take it. The claim rather is that the Union officials during a certain period of time before January 19, 1974 were perfunctory, or acted in bad faith, or did not properly represent the interests of the employees in pursuing these grievances, and there is some evidence to support that in a general way. There apparently was a good deal of animosity between Mr. Odell Smith, the former president of the Union, and some of the employees, especially employees of ABF. That animosity ultimately resulted in an election in which Mr. Pickering, the present president of the Union succeeded Mr. Smith. The general feeling that has been expressed by the plaintiffs is that Mr. Smith was rather uncooperative, and is a feeling that the Court understands.

The fact remains, however, that the grievances were taken to the Multistate Commitee and were decided by that Committee.

So the question becomes under the controlling Supreme Court precedents whether there is any reason in the evidence to set aside and disregard the findings and holdings of the Grievance Committee. The Supreme Court has admonished the lower Courts that the method of decision set out in the contract is to be honored; that the Congressional policy which I have referred to in quoting from the statute can be effectuated only if the means chosen by the parties for settlement of any differences under a Collective Bargaining Agreement is given full play. The Courts are not to usurp those functions since Collective Bargaining contracts are properly entrusted to the arbitration tribunal, and

when the Court speaks of "arbitration" the same principles apply to a grievance procedure such as that as is set out here, because it is, in effect, the same thing.

We are told further that the lower courts should not undertake a review the merits of the arbitration awards and should defer to the tribunal chosen by the parties finally to settle their disputes; otherwise review by a Court of the merits would make meaningless the provisions that the arbitrator stated in his findings. Those are quotations from Hines against Anchor Motor Freight, 424 U.S. 54 at Pages 562 and 563, a case decided by the Supreme Court in 1976, and apparently the latest precedent that is a comprehensive discussion of the roles of the grievance procedure in this kind of a dispute.

And so the Court has to examine and determine what happened to those grievances, and as far as possible to determine why what happened did happen.

The claim is, essentially, that the grievance procedure was vitiated or that its integrity was undermined because there was a side deal of some kind between the Union represented by Mr. Smith and the employer.

The Court is rather inclined to think that there was a side deal. The testimony is sharply conflicting on that point and the Court is not holding that it disbelieves Mr. Carter. It was not necessarily Mr. Carter who was a party to the side agreement, but the Court is assuming for the sake of argument that there was in fact a side agreement between Mr. Smith for the Local Union under his control and the company.

The Court is particularly persuaded by the testimony of Mr. Pickering on that point. Mr. Pickering didn't say that there was a side agrement and, in fact, said

that he had no personal knowledge of it; but when the Court considers the implications of his testimony and the direct testimony of the other employees, the evidence seems to me rather to predominate in favor of the finding that there was a side agreement. So, the Court is going to assume that there was for purposes of further discussion.

Let me say, first of all, that there is no evidence whatever that the side agreement was illegal or improper. There is no evidence, indeed there has been no suggestion, that Mr. Odell Smith received any improper consideration from the company. There is no evidence that the side agreement was fraudulent. There is no evidence that it was necessarily even improper under the contract.

There are a lot of situations that arise under contracts as there are under statutes where the parties fill in the gaps, so to speak, by making side agreements from time to time. The practice about paying one-quarter hour, for example, even if only eight minutes has been worked, is a side agreement of sorts. It could be argued that it was directly contrary to Article 50 to pay a man nothing when he has worked seven minutes because Article 50 doesn't say anything about quarter hour increments.

So, side agreements can be, it is possible, made from time to time where the parties by their own actions, explicit or implicit, fill in the gaps that always arise with a written instrument when you apply that instrument to a multiplicity of situations and practices.

In any event, even if there was a side agreement, and the Court is assuming that there was one, and even if it was improper, there is no evidence that the ex-

istence of a side agreement had anything to do with the way these grievances were decided by the Committee. For example, we know that grievances were presented by Mr. Barrentine and Mr. Scates after Mr. Pickering became president of the Union and no one has complained that Mr. Pickering behaved improperly, or that the Union has been unresponsive under his leadership. The testimony is all to the contrary.

Specifically, Mr. James French, who handled one of these grievances has had his conduct approved by these plaintiffs, they are not complaining that he did anything improper. So, we have a clearly untainted, you might say, decision by the Grievance Committee in the post-Smith time period.

Plaintiffs seek to avoid the force of that by arguing that the Committee was decisively influenced by precedent, that is, the argument is that there was a tainted decision of the Grievance Committee during the Smith regime, that the Grievance Committee during the Pickering regime relied upon that tainted precedent, and that, therefore, the entire grievance process under both leaderships is suspect. The Court cannot agree with that argument.

It is true that past precedent was argued to the Committe in the post-Smith grievance hearings, and I feel certain, and I am assuming for present purposes, that the fact that Mr. Barrentine had lost his 1969 grievance was argued to the Committee after Mr. Smith went out as a reason for adhering to the same ruling.

But here we are faced with the direct testimony, which the Court believes, of Mr. William G. Carston who handled the 1969 grievance for the company. His testimony was that the grievance was not perfunctorily

presented on either side and that nothing about a side agreement was stated to the Committee. The Court, therefore, concludes that the side agreement, if it existed did not have any effect on the 1969 grievance decision and that, therefore, any effect that the '69 grievance decision had on the later grievance decision was not improper.

In addition, the testimony of Albert L. Johnson, which the Court also believes, is persuasive. He presented the company's side of the Barrentine and Scates grievances during Mr. Pickering's term, and his testimony is that there was nothing said in the Committee about the side agreement at that point.

So what we have is a decision of the Grievance Committe untainted and uninfluenced by anything about a side agreement.

Why did the Grievance Committee reach the decision that it did? That would be speculation on the Court's part because no reasons were given, but the Court can mention a few factors that may have led the Committee to come to its conclusions.

First of all, there are always disputes about methods of computing time. For example, the Strickland practice of paying for fifteen minutes no matter how much time is actually spent. For another example, the practice at ABF of paying for a quarter hour.

There are questions that arise in the interpretation of the contract that have to be settled one way or the other, and the Court cannot say that the contract is so clear on his point that the Grievance Committee decision was without rational basis.

In addition to that argument there was the point of

past practice which is an influential point in this matter. There was the fact that there was another precedent involved, not only the '69 down time precedent, but there was a precedent from the Central States findings under which Case Number 412 involving Mr. Winfield, an employee of East Texas Motor Freight.

So the result is that the Grievance Committee, for reasons sufficient to itself, decided that this time was not spent in the service of the employer within the meaning of the contract.

This Court is not at liberty to substitute its judgment for the judgment of the Grievance Committee. The Committee was established by the contracting parties to make this kind of decisions, and the Court doesn't have the power to set it aside. If the Grievance Commitee had been shown to have been influenced by fraud or impropriety, or if the Union had failed in its duty of fair representation to these employees, or if, perhaps, the decision was so clearly contrary to the language of the contract that some impropriety could be inferred, then the bar of finality attaching in this contract to the Grievance Commitee's decision could be voided. The Court finds that none of these requirements is met here. The result that the decision of the Grievance Committee is final and binding and it is a bar to these claims; therefore the Complaint must be dismissed with prejudice.

Mr. McHughes, do you have any question about the Court's ruling, or has anything been omitted?

MR. McHUGHES: No, your Honor.

THE COURT: Miss Kozinski?

MISS KOZINSKI: No, your Honor.

THE COURT: Mr. Maurras?

MR. MAURRAS: No, your Honor.

THE COURT: Judgment will be entered accordingly.

Mr. Marshal, we are in recess.

CERTIFICATE OF REPORTER

I, Thomas R. Lancaster, Official Court Reporter for the United States District Court for the Eastern District of Arkansas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the Opinion of the Court had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me to the best of my ability.

/s/ Thomas R. Lancaster
THOMAS R. LANCASTER

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LLOYD BARRENTINE, EA AL *Plaintiff*

v. No. LR-C-77-85

ARKANSAS-BEST FREIGHT SYSTEM, INC *Defendant*

ORDER

Currently pending before the Court is plaintiffs' motion for entry of judgment on their claim for relief under Count I of their complaint which is predicated on the purported violation by defendant, Arkansas-Best Freight System, Inc. (ABF), of the Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.,* by refusing to pay plaintiffs at least the minimum wage for all time spent conducting pre-trip safety inspection of their vehicles in cases where defects are found and the vehicles must be delivered to ABF's repair facility for repairs.

ABF resists plaintiffs' motion by asserting:

1. If plaintiffs' motion is granted, ABF would be denied the right to a trial; and,

2. Plaintiffs are not entitled to judgment on the current state of the record.[1]

The Court is persuaded that the Supreme Court's comment at footnote 13, in its opinion, is dispositive of the question whether this Court should conduct a full-

[1]A comprehensive analysis of prior proceedings and Court rulings may be found in the following appelate decisions: **Barrentine v. Arkansas-Best Freight Systems, Inc.,** 450 U.S. 728 (1981); **Barrentine v. Arkansas-Best Freight Systems, Inc.,** 615 F. 2d 1194 (8th Cir. 1980).

scale evidentiary hearing in order to resolve plaintiffs' request for judgment. The footnote provides in relevant part:

> "The threshold question in this action . . . is whether petitioners were engaged in 'activities which are preliminary to [their] principal activities . . . when they conducted the pre-trip inspections of their vehicles. Resolution of that question requires inquiry into whether the inspection and transportation procedure are an integral and indispensable part of the principal activities for which [petitioners] are employed. . .' [W]e conclude that this is a question of statutory construction that must be resolved by the courts."

In short, the Court is persuaded the issue for resolution is legal as opposed to a factual one and, *accordingly, a trial is not required.* Moreover, Judge Richard Arnold, the initial trial judge in this action, conducted a full-scale trial which the Court concludes is sufficient to enable the Court to dispose of the threshold question as mandated by the Supreme Court.

Accordingly, in considering the record in this case, the pre-trip safety inspection requirements contained in the Department of Transportation regulations establishing truck maintenance requirements, 49 C.F.R. §§ 390.1 *et seq.*, the stipulation between the parties and memoranda filed by counsel, the Court finds:

1. The pre-trip inspection time expended by plaintiffs constitute an integral and indispensable part of the plaintiffs' duties of driving trucks as employees of ABF which are performed in the ordinary course of employment duties.

2. Plaintiffs are entitled to minimum wage compensation for the time they spend conducting pre-trip safety inspections. Since plaintiffs only sought com-

pensation in cases where defects are found and the vehicles must be brought to defendant's repair facility, this Order is limited to such cases.

3. That plaintiffs' motion should be granted.

THEREFORE, defendant, Arkansas-Best Freight System, Inc., is hereby enjoined from continuing to violate the Fair Labor Standards Act by refusing to pay plaintiffs at least the minimum wage for all time spent conducting pre-trip safety inspection of their vehicles in cases where defects are found and the vehicles must be brought to defendant's repair faciilty.

IT IS FURTHER ORDERED that counsel for both parties shall attempt to resolve the question of damages under 29 U.S.C. § 216(b) within thirty days of the date of this order. If counsel are unable to resolve the damages issue within such time frame, counsel shall submit proposals regarding the computation of damages to the Court within ten days.

IT IS SO ORDERED this 16th day of June, 1983.

GEORGE HOWARD, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1932

Lloyd Barrentine, et al Clyde G. Edwards, Cleo Keeney; Maxine Blanton; Johnny Robinson; J. N. Scates; Charley Deaton; H. E. Mitchell and L. R. Young, *Appellees,*	*	Appeal from the United States District Court for the Eastern District of Arkansas
v.		
Arkansas-Best Freight System, Inc., *Appellant.*	*	

Submitted: April 11, 1984
Filed: December 10, 1984

Before McMILLIAN, Circuit Judge, FAIRCHILD,* Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

McMILLIAN, Circuit Judge.

Arkansas-Best Freight System, Inc., appeals from a final judgment entered in the District Court[1] for the Eastern District of Arkansas awarding individual employees or former employees unpaid wages in their

*The Honorable Thomas E. Fairchild, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

[1]The Honorable George Howard, Jr., United States District Judge for the Eastern and Western Districts of Arkansas.

action under § 16(b) of the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C. § 216(b) (1982), and enjoining it from continuing to violate the FLSA by refusing to pay the named employees at least minimum wage for time spent in certain activity. For reversal appellant argues that (1) the activity involved is not compensable work under the FLSA, (2) the activity involved is exempt under § 4(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 254(a) (1982), and (3) an injunction is not an available remedy in an FLSA suit for back wages brought by employees on their own behalf rather than by the Secretary of Labor. For the reasons discussed below, we affirm the judgment of the district court as to back wages and vacate the injunction.

This case has an interesting history which includes a previous encounter with this court and a visit to the United States Supreme Court. Appellees are over-the-road truck drivers employed, or formerly employed, by appellant, an interstate common motor carrier, at appellant's Little Rock, Arkansas, terminal.[2] Upon reporting for duty at the terminal, a truck driver "punches in" on a time clock, receives dispatch papers and completes some preliminary paper work. The driver then "punches out," proceeds to an assigned vehicle and conducts a pre-trip safety inspection of the vehicle as required by federal regulations. If the driver finds no defects, the driver proceeds on his or her trip.

If, however, a defect is detected, the driver must drive the vehicle to Arkansas-Best's repair facility located in the terminal, "punch in" again and wait for

[2]Since commencement of this action, appellant's terminal has been moved to North Little Rock, Arkansas.

the vehicle to be repaired. The driver then "punches out" and commences the trip. In such a case, the driver is paid for the time spent between the second "punch in" and "punch out," but not for the time between the first "punch out" and the second "punch in." It is this policy which is the gravamen of the case.

Pursuant to the collective bargaining agreement between the parties, employee grievances were filed, claiming that under the collective bargaining agreement which required compensation "for all time in (the employer's) service," the truck drivers were entitled to compensation for the time in question. A joint grievance committe rejected the grievances without explanation.

Appellees[3] then filed a two-count complaint in federal district court alleging in Count I that the time in question was compensable under the FLSA and in Count II that the Union breached its duty of fair representation in processing the grievances. The district court addressed *only* the fair representation claim and, finding it to be without merit, dismissed the complaint.[4]

On appeal this court affirmed the district court's holding as to the fair representation claim and also held that appellees' submission of their grievances to arbitration barred them from asserting their statutory wage claim in the subsequent court action. *Barrentine v. Arkansas-Best Freight System,* 615 F.2d 1194 (8th Cir. 1980). The United States Supreme Court granted certiorari and reversed, holding that the FLSA wage

[3]There were originally nine appellees in the case; there were eventually dismissed with prejudice.

[4]The district court announced its decision, which incorporated findings of fact and conclusions of law, from the bench.

claim was not barred by the prior unsuccessful submission of the dispute to the contractual dispute resolution procedure. *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728 (1981). The case was accordingly remanded to the district court for resolution of appellees' statutory wage claim. On remand the district court held that the pre-trip safety inspection procedure involved in the suit was an integral and indispensable part of appellees' duties as employees of appellant and, therefore, not exempt from compensation by the Portal-to-Portal Pay Act. *Barrentine v. Arkansas-Best Freight System,* No. LR-C-77-85 (E.D. Ark. June 16, 1983). Judgment was entered in favor of appellees for back wages and an injunction issued enjoining appellant from continuing to violate the FLSA by refusing to pay appellees at least minimum wage for the time spent on the activity in issue. This appeal followed.

Back Wages

Appellant first argues that the time spent performing the safety inspection and transporting the defective vehicle to the repair facility is not compensable under the FLSA.

The FLSA requires the payment of a minimum wage to "employees who in any workweek (are) engaged in commerce or in the production of goods." 29 U.S.C. § 206(a). The FLSA does not provide a statutory definition of work or employment; however, Supreme Court decisions have established guidelines for determining whether or not hours worked are covered by the FLSA. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local* 123, 321 U.S. 590, 598 (1944), the Court interpreted the FLSA to embrace "physical or mental

exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." See also *Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944).

Appellant argues that because appellees are required to make the pre-trip safety inspection by federal regulations, such activity is not "controlled or required by the employer." Appellant further argues that these inspections are "primarily for the benefit" of the driver and not "of the employer and his business." Both these arguments are without merit. The fact that a pre-trip safety inspection is required by federal regulations does not remove the employer's control over and responsibility for this inspection. And, although the individual driver of the vehicle will, of course, benefit from the safety inspection and repair of defects, appellant and the trucking industry as a whole, not to mention the motoring public, are certainly beneficiaries of the inspection procedure. We thus hold that the activity involved here meets the standard set forth by the Supreme Court for compensable activity under the FLSA. *Cf. Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1162 (D.C. Cir. 1975) (time spent by employee representative in voluntarily accompanying federal inspectors in a workplace inspection is not compensable under the FLSA because employer does not select employee representative or regulate his conduct and because the employees are the beneficiaries of the inspection).

Appellant next argues that, in any event , liability is precluded by § 4(a) of the Postal-to-Portal Act, 29 U.S.C. § 254(a) (2), which relieves employers of back wages liability under the FLSA for

> activities [of an employee] which are preliminary to or postliminary to [the] principal activity or activities [which such employee is employed to perform], which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Appellant argues that the principal activity for which appellees are employed is driving trucks and that the safety inspections are merely incidental and preliminary thereto. We disagree.

The legislative history of the Portal-to-Portal Act and decisions construing it in conjunction with the FLSA make clear that the terms "principal activity or activities," which must be paid for, are to be read liberally. Any activity which is "an integral and indispensable part of" the principal activity is compensable. *Steiner v. Mitchell,* 350 U.S. 247, 256 (1955). The only activities excluded from FLSA coverage are those undertaken "for (the employees') own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer." *Dunlop v. City Electric, Inc.,* 527 F.2d 394, 398 (5th Cir. 1976). Examples of non-compensable activities specifically enumerated in the Senate report on the Portal-to-Portal Act as being "outside the employee's workday," include "(c)hecking in and out and waiting in line to do so, changing clothes, washing up or showering, (and) waiting in line to receive paychecks." S. Rep. No. 48, 80th Cong., 1st Sess. 47 (1947). The pre-trip safety inspection activities for which appellees here seek compensation are clearly of a different nature and we hold that they are such an integral part of and so indispensable to appellees' principal activity

as to be outside the Portal-to-Portal Act exemption. See *Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721, 724-25 (5th Cir. 1961) (truck drivers' pre-trip activities including checking and servicing vehicle were outside the Portal-to-Portal exemption).

Injunctive Relief

Appellant argues that under the FLSA enforcement scheme appellees are not entitled to injunctive relief against appellant. We agree. Congress has framed various remedial measures for implementation and furtherance of its declared policies in the FLSA. Under 29 U.S.C. § 216(b), employees may maintain an action on their own behalf against an employer for unpaid wages and liquidated damages.[5] Subsection (c) of § 216 authorizes the Secretary of Labor to bring suit on behalf of employees who request assistance to recover unpaid wages, provided the case does not involve an issue of law not finally settled by the courts. The right of employees to resort to legal action on their own behalf terminates "upon the filing of a complaint by the Secretary of Labor in an action under § 217 of this title." 29 U.S.C. § 216(b). (Section 217, entitled "Injunction proceedings," grants the district courts jurisdiction to restrain violation of provisions of the FLSA, including the minimum wage provision. Title 29 U.S.C. § 211(a) provides that "[e]xcept as provided in section

[5]Under the Portal-to-Portal Act amendments, 29 U.S.C. § 260, even if the employer shows both subjective good faith and objectively reasonable grounds for believing that its actions were not in violation of the statute, remission of liquidated damages remains within the sound discretion of the trial court. **E.g., Thompson v. Sawyer,** 219 U.S. App. D.C. 393, 678 F.2d 257, 282 (1982); **Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare,** 452 F.2d 820, 826)8th Cir. 1971), (banc), **aff'd,** 411 U.S. 279 (1973).

212 of this title [relating to child labor], the Secretary of Labor shall bring all actions under section 217 of this title to restrain violations of this chapter."

Courts are in agreement that under this scheme an employee's action can be maintained only to recover back wages and liquidated damages and not to obtain injunctive relief against future violations; only the Secretary is vested with the authority to seek an injunction. *See, e.g., Bowe v. Judson C. Burns, Inc.,* 137 F.2d 37, 39 (3rd Cir. 1943); *Marchak v. Observer Publications, Inc.,* 493 F. Supp. 278, 280-81 (D.R.I. 1980); *EEOC v. American Telephone & Telegraph Co.,* 365 F. Supp. 1105-1119-22, (E.D. Pa. 1973). Although the injunction in the present case is limited, applying only to the individual employees involved in the suit, and is ancillary to an award of money damages, we do not believe it is authorized unde rthe comprehensive statutory enforcement scheme.

Accordingly, we affirm the judgment of the district court as to back wages and vacate the injunction. Costs on appeal awarded to appellees.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.